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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/823,243	04/12/2004	Jon P. Hassell	4186 PUS	4069
7590 Konstantine J. Diamond 4010 E. 26th Street Los Angeles, CA 90023		05/24/2007	EXAMINER GROSSO, HARRY A	
			ART UNIT 3781	PAPER NUMBER
			MAIL DATE 05/24/2007	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

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Office Action Summary	Application No. 10/823,243	Applicant(s) HASSELL ET AL.	
	Examiner Harry A. Grosso	Art Unit 3781	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 April 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-38 is/are pending in the application.
- 4a) Of the above claim(s) 36-38 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 24-26 is/are allowed.
- 6) ☒ Claim(s) 1-23 and 27-35 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 12 April 2004 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date <u>3/20/06, 8/18/06, 2/7/07</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Oath/Declaration

The oath or declaration is defective. A new oath or declaration in compliance with 37 CFR 1.67(a) identifying this application by application number and filing date is required. See MPEP §§ 602.01 and 602.02.

The oath or declaration is defective because: It does not state that the person making the oath or declaration acknowledges the duty to disclose to the Office all information known to the person to be material to patentability as defined in 37 CFR 1.56. Filed declaration refers to information which is material to "examination".

Election/Restrictions

Restriction to one of the following inventions is required under 35 U.S.C. 121:

- I. Claims 1-35, drawn to a container, classified in class 206, subclass 506.
- II. Claims 36-38, drawn to a method of stacking the container, classified in class 29, subclass 428.

Inventions of Group I and Group II are related as product and process of use.

The inventions can be shown to be distinct if either or both of the following can be shown: (1) the process for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a materially different process of using that product. See MPEP § 806.05(h). In the instant case the container can be used singly without the presence of a second container.

Restriction for examination purposes as indicated is proper because all these inventions listed in this action are independent or distinct for the reasons given above

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and there would be a serious search and examination burden if restriction were not required because one or more of the following reasons apply:

- (a) the inventions have acquired a separate status in the art in view of their different classification;
- (b) the inventions have acquired a separate status in the art due to their recognized divergent subject matter;
- (c) the inventions require a different field of search (for example, searching different classes/subclasses or electronic resources, or employing different search queries);
- (d) the prior art applicable to one invention would not likely be applicable to another invention;
- (e) the inventions are likely to raise different non-prior art issues under 35 U.S.C. 101 and/or 35 U.S.C. 112, first paragraph.

Applicant is advised that the reply to this requirement to be complete must include (i) an election of a invention to be examined even though the requirement may be traversed (37 CFR 1.143) and (ii) identification of the claims encompassing the elected invention.

The election of an invention may be made with or without traverse. To reserve a right to petition, the election must be made with traverse. If the reply does not distinctly and specifically point out supposed errors in the restriction requirement, the election shall be treated as an election without traverse. Traversal must be presented at the time of election in order to be considered timely. Failure to timely traverse the requirement will

result in the loss of right to petition under 37 CFR 1.144. If claims are added after the election, applicant must indicate which of these claims are readable on the elected invention.

If claims are added after the election, applicant must indicate which of these claims are readable upon the elected invention.

Should applicant traverse on the ground that the inventions are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the inventions to be obvious variants or clearly admit on the record that this is the case. In either instance, if the examiner finds one of the inventions unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C. 103(a) of the other invention.

During a telephone conversation with Mr. John Carlson on May 14, 2007 a provisional election was made without traverse to prosecute the invention of Group I, claims 1-35. Affirmation of this election must be made by applicant in replying to this Office action. Claims 36-38 withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Drawings

The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the first pivot axis positioned inwardly of the second axis (claims 2 and 28) and the protrusion having a substantially vertical surface adjacent the second pivot axis (claim 8) must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 2, 8, 21-23 and 28 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 2 and 28 recite the limitation of the first pivot axis positioned inwardly of the second axis. This is not shown and it is unclear how this is accomplished.

Claim 8 recites the limitation of the protrusion having a substantially vertical surface adjacent the second pivot axis. This is not shown and it is unclear where this is located.

Claim 21 recites the limitation "the inner and outer wall portions" in line 9. There is insufficient antecedent basis for this limitation in the claim. Claims 22 and 23 are dependent on claim 21.

Claim Rejections - 35 USC § 103

Claims 21-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Loftus et al (5,772,033) (Loftus) in view of Stahl et al (4,391,369) (Stahl).

Regarding claim 21, Loftus discloses a container with a floor (12, Figures 1-2, column 3, line 28 to column 4, line 45), a plurality of walls with a pin opening (18), a bail member (22) with a support portion (23) and an arm (26) and a pin (24). The arm is received between inner and outer walls (Figure 2) and the bail member can be moved to a nest position, a first position and a second position. Loftus does not teach a bail cap. Stahl discloses a similar container with a bail cap on the outer end of the pin with a diameter perpendicular to the pin that is greater than the pin opening (54, Figure 2, column 3, lines 33-37) It would have been obvious to one of ordinary skill in the art at the time the invention was made to have incorporated the use of a bail cap on the pin as disclosed by Stahl in the container disclosed by Loftus to prevent the pin from being removed from the pin opening.

Regarding claim 22, the bail cap is on one side of the pin opening and the arm is on the other side in Loftus as modified by Stahl.

Regarding claim 23, Loftus discloses an outer wall portion and an inner wall portion spaced inwardly from the outer wall portion (Figure 2).

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-23 and 27-35 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-5 and 7-22 of copending Application No. 10/854,378 in view of Aiken et al (6,938,772) and Stahl. The copending application discloses all of the features of the instant application except for a protrusion between the first and second axes, the pivoting of the bail at the first and second axes and the use of the bail cap. Aiken et al discloses a similar container with a protrusion between the first and second axes and a bail that pivots on the first and

second pin axes. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have incorporated the use of the first and second axes as pivot points and a protrusion between the first and second axes as disclosed by Aiken et al as means for moving the bail from one setting to another by pivoting and to keep the bail pin in proper position.

Stahl discloses a similar container with a bail cap on the outer end of the pin with a diameter perpendicular to the pin that is greater than the pin opening (54, Figure 2, column 3, lines 33-37) It would have been obvious to one of ordinary skill in the art at the time the invention was made to have incorporated the use of a bail cap on the pin as disclosed by Stahl in the container disclosed by Loftus to prevent the pin from being removed from the pin opening.

This is a provisional obviousness-type double patenting rejection.

Claims 1-23 and 27-35 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-18 and 20-24 of copending Application No. 10/880,414 in view of Aiken et al (6,938,772) and Stahl. The copending application discloses all of the features of the instant application except for a protrusion between the first and second axes, the pivoting of the bail at the first and second axes and the use of the bail cap. Aiken et al discloses a similar container with a protrusion between the first and second axes and a bail that pivots on the first and second pin axes. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have incorporated the use of the first and second axes as pivot points and a protrusion between the first and second axes as disclosed by

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Aiken et al as means for moving the bail from one setting to another by pivoting and to keep the bail pin in proper position.

Stahl discloses a similar container with a bail cap on the outer end of the pin with a diameter perpendicular to the pin that is greater than the pin opening (54, Figure 2, column 3, lines 33-37) It would have been obvious to one of ordinary skill in the art at the time the invention was made to have incorporated the use of a bail cap on the pin as disclosed by Stahl in the container disclosed by Loftus to prevent the pin from being removed from the pin opening.

This is a provisional obviousness-type double patenting rejection.

Allowable Subject Matter

Claims 24-26 are allowed.

The following is a statement of reasons for the indication of allowable subject matter: the prior art does not teach a container with a nesting position and three stacking positions with the support rests on an inner or outer wall and having the bail pin moveable to a plurality of pivot axes within a pin opening.

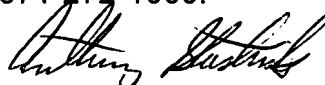
Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Harry A. Grosso whose telephone number is 571-272-4539. The examiner can normally be reached on Monday through Thursday from 7am to 4 pm.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anthony Stashick can be reached on 571-272-4561. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Anthony Stashick
Supervisory Patent Examiner
Art Unit 3781

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